No. 753

FILED
NOV 22 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

314-697

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of the WABASH RAILWAY COMPANY, a Corporation,

Petitioners,

vs.

OLIVER S. PERRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

WAYNE ELY,
Commerce Building,
St. Louis, Missouri,
Solicitor for Petitioners.

N. S. BROWN,
J. H. MILLER,
R. B. ELSTER,
Railway Exchange Building,
St. Louis, Missouri,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for writ of certiorari.....1–17
Statement of the matters involved..... 1
The facts 2
Questions presented 8
Reasons for granting the writ..... 10

Brief in support of petition for writ of certiorari....18–37
Opinion below 18
Jurisdiction 18
Statement of the case..... 18
Specification of errors..... 19
Summary of argument 19
Argument 23
Conclusion 36

Cases Cited.

Aqua System, Inc., v. Kodakoski (C. C. A. 5), 88 Fed. (2d) 395, 398 12
Atchison, Topeka & Santa Fe Railway Co. v. Saxon, 284 U. S. 458, 459, 76 L. Ed. 397, 398.....10, 22, 36
Atchison, Topeka & Santa Fe Ry. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896..... 10
Austin v. So. Ry. Co., 197 N. C. 319, 148 S. E. 446.... 15
Bakkin v. State, 60 N. D. 344, 234 N. W. 513..... 15
Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338. 14
Bell et al. v. McDonnell, 156 Okla. 68, 9 P. (2d) 735, 736 15
Bray v. Gulf Stevedoring Co. (C. C. A. 5), 18 Fed. (2d) 411, 412 12
Brooks v. Arnett, 253 Ky. 491, 69 S. W. (2d) 1029, 1030 14
Brooks v. Louisville & N. R. Co., 233 Ky. 656, 26 S. W. (2d) 523, 524, 525..... 14
Brown v. Coley, 168 Miss. 778, 152 So. 61..... 14
Brown v. Goodyear Yellow Pine Co. (C. C. A. 5), 102 Fed. (2d) 726..... 12

Brownfield Ry. Co. v. Chic., R. I. & P. Ry., 107 Iowa 254, 77 N. W. 1038 14
Burmaster v. Tex. & P. M. P. Terminal R. of New Orleans, 6 La. App. 778 14
Bush v. Cincinnati Traction Co. (C. C. A. 6), 192 Fed. 241, 244 13
Canadian Northern Ry. Co. v. Walker, 172 Fed. 346, 356 11
Carnegie Steel Co. v. Byers (C. C. A. 6), 149 Fed. 667, 669 13
Carpenter v. Baltimore & Ohio R. Co. (C. C. A. 6), 109 Fed. (2d) 375, 378 12
Chesapeake & O. Ry. Co. v. Butler, 163 Va. 626, 177 S. E. 195 16
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041 ..... 10, 22
Chicago, M. St. P. & P. R. Co. v. Gilbert (C. C. A. 9), 87 Fed. (2d) 282, 286 13
Chicago & N. W. Ry. Co. v. O'Brien (C. C. A. 8), 132 Fed. 593, 596, 597, 598 11
Clinard v. Clinard Electric Co., 192 N. C. 736, 136 S. E. 1 15
Cole v. Seaboard Air Line Ry. Co., 199 N. C. 389, 154 S. E. 682 (c. d. 282 U. S. 898, 75 L. Ed. 791) 15
Colonna v. Merchants & Miners Transportation Co. (C. C. A. 4), 112 Fed. (2d) 612, 615 12
Copeland v. Chicago, B. & Q. R. Co. (C. C. A. 8), 293 Fed. 12 ..... 11, 34
Cryder v. Chicago, R. I. & P. Ry. Co. (C. C. A. 8), 152 Fed. 417, 419 11
Dawson v. Reading Co., 283 Pa. 301, 142 Atl. 295 (c. d. 278 U. S. 628, 73 L. Ed. 547) 15
Degner v. Anderson, 213 Iowa 588, 239 S. W. 790, 791. 14
Delaware, Lackawanna & Western R. Co. v. Koske, 279 U. S. 7, 73 L. Ed. 578 10
Denver & S. L. Ry. Co. v. Mullen, 86 Colo. 159, 279 Pac. 49, 50, 51 14
Detroit, G. H. & M. Ry. Co. et al. v. Maldonado (C. C. A. 6), 59 Fed. (2d) 911, 912 13
Dryden v. Western Pac. R. Co., 1 Calif. App. (2d) 49, 36 Pac. (2d) 394 14

Erickson v. Pacific States Lumber Co. (C. C. A. 9), 18 Fed. (2d) 513, 514 13
Fisher v. Kansas City, M. & O. Ry. Co., 169 Okla. 282, 36 Pac. (2d) 744 15
Fitzgerald v. Oregon-Washington R. & Nav. Co., 141 Oregon 1, 16 Pac. (2d) 27, 30, 31 15
F. W. Martin & Co. v. Cobb (C. C. A. 8), 110 Fed. (2d) 159, 163 ..... 10, 30
Gibralter Coal Mining Co. v. Collins, 237 Ky. 765, 36 S. W. (2d) 372, 373 14
Goodyear Yellow Pine Co. v. Clark, 163 Miss. 661, 142 So. 443 14
Grant v. R. R. Co., 133 N. Y. 659, 31 N. E. 220 15
Hamilton v. Chicago, B. & Q. R. Co., 211 Iowa 924, 234 N. W. 810, 812, 813 14
Healy v. Erie R. Co., 259 N. Y. 40, 180 N. E. 888, 890 .. 15
Hodges v. Kimball et al. (C. C. A. 4), 104 Fed. 745, 751 12
Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Stat. Rep. 613 15
Hunt v. Robinson, ... Tex. Civ. App. ..., 55 S. W. (2d) 166, 167 15
Illinois Central R. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138 15
James v. Yazoo & M. V. R. Co., 153 Miss. 776, 121 So. 819 14
James Stewart & Co. v. Newby (C. C. A. 4), 266 Fed. 287, 290 12
Kaemmerling v. Athletic Mining & Smelting Co. (C. C. A. 8), 2 Fed. (2d) 574 11
Koetsier v. Cargill Co., 241 Mich. 370, 217 N. W. 51, 52, 53 14
Kyner v. Portland Gold Mining Co. (C. C. A. 8), 184 Fed. 43, 47 11
Leonard v. Miami Mining Co. (C. C. A. 4), 148 Fed. 827, 828 12
Looney v. Metropolitan R. R. Co. et al., 200 U. S. 480, 50 L. Ed. 564, 568 ..... 10, 32
Loring v. Maine Cent. R. Co., 129 Me. 369, 152 Atl. 527 14
Louisville & N. R. Co. v. Jackson, 3 Tenn. A. 463 ... 15

Lucid v. E. I. Du Pont deNemours Co. (C. C. A. 9), 199 Fed. 377, 378, 379 13
McDonnell v. Oceanic Steam Navigation Co. (C. C. A. 2), 143 Fed. 480, 483 11
McGraw v. Southern Ry. Co., 206 N. C. 873, 175 S. E. 286 15
Midland Valley R. Co. v. Fulgham (C. C. A. 8), 181 Fed. 91, 95 11
Mining Co. v. Kitts, 42 Mich. 41, 3 N. W. 240 14
Missouri, K. & T. Ry. Co. v. Foreman et al. (C. C. A. 8), 174 Fed. 377, 381 11
Missouri Pacific Co. v. Remel, 185 Ark. 598, 48 S. W. (2d) 548 (c. d. 287 U. S. 634, 77 L. Ed. 550) 13
Missouri Pacific R. Co. v. Montgomery, 186 Ark. 537, 55 S. W. (2d) 68 (c. d. 289 U. S. 747, 77 L. Ed. 1493). 13
Moit v. Illinois Central R. Co. (C. C. A. 6), 153 Fed. 354, 356 12
Mosley v. Raines, 183 Ark. 569, 37 S. W. (2d) 78, 80.. 13
Nebraska Bridge Supply & Lumber Co. v. Jeffery (C. C. A. 8), 159 Fed. 609, 611 11
New England Navigation Co. v. Luliano (C. C. A. 2), 192 Fed. 551, 554 11
New Orleans Great Northern R. Co. v. Branton, 167 Miss. 52, 146 So. 870 (c. d. 290 U. S. 667, 78 L. Ed. 577) 15
Northern Pac. Ry. Co. v. Dixon (C. C. A. 8), 139 Fed. 737, 740 ..... 11, 32
Northwestern Pac. R. Co. v. Bobo, 290 U. S. 499, 78 L. Ed. 462 10
N. Y. Central R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562 10
O'Mara v. Pennsylvania R. Co. (C. C. A. 6), 95 Fed. (2d) 762, 763 13
Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 45 L. Ed. 361 ..... 10, 22, 33
Payne v. Buecher (C. C. A. 3), 270 Fed. 38, 40 12
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819 10
Pennsylvania R. Co. v. Knox (C. C. A. 3), 218 Fed. 748, 753 12
Philadelphia & R. Ry. Co. v. Cannon (C. C. A. 3), 296 Fed. 302, 304, 306 12

Philadelphia & R. Ry. Co. v. Thirouin (C. C. A. 3), 9 Fed. (2d) 856, 858 12
Phillips Petroleum Co. v. Manning (C. C. A. 8), 81 Fed. (2d) 849, 851, 852, 853 11
Pierce v. Kile (C. C. A. 7), 80 Fed. 865, 867 13
Prichard v. Southern Pac. Co. et al., 9 Cal. App. (2d) 701, 51 Pac. (2d) 426, 427 14
Potter v. Atl. Coast Line R. Co., 197 N. C. 17, 147 S. E. 698 15
Raftery v. Pittsburgh & W. V. Ry. Co., 284 Pa. 555, 131 Atl. 470 15
Roberts v. L. & N. R. Co., 111 Fed. (2d) 826, 827, 828. 12
Rupert v. Chicago, M. St. P. & P. R. Co., 202 Wis. 563, 232 N. W. 550 (c. d. 283 U. S. 840, 75 L. Ed. 1451).. 16
Sabol v. St. Louis Cooperage Co., 313 Mo. 527, 282 S. W. 425, 428, 429 15
Schroble v. Lehigh Valley R. Co. (C. C. A. 2), 62 Fed. (2d) 993, 996 11
Seaboard Air Line Ry. Co. v. DeLoatch, 149 Va. 338, 141 S. E. 121 16
Seaboard Air Line Ry. Co. v. Hackney, 217 Ala. 382, 115 So. 869 13
Shipp v. Boston & M. R. R. Co., 283 Mass. 266, 186 N. E. 653 14
Sierocinski v. E. I. Du Pont deNemours & Co. (C. C. A. 3), 118 Fed. (2d) 531, 535 12
Slamin v. New York, N. H. & H. R. Co., 282 Mass. 590, 185 N. E. 353, 354 14
Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 Pac. 719 13
Southern Ry. Co. v. Derr (C. C. A. 6), 240 Fed. 73, 74, 76 ..... 13, 31
Southern Ry. Co. v. Stewart (C. C. A. 8) (on rehearing), 119 Fed. (2d) 85, 89 ..... 11, 35
Southern Ry. Co. v. Stewart (C. C. A. 8), 115 Fed. (2d) 317, 322 10
Sowers v. Virginian Ry. Co., 101 W. Va. 582, 133 S. E. 325 16
Spain v. Powell et al. (C. C. A. 4), 90 Fed. (2d) 580, 581, 582, 583 12
Stepanovich v. Pittsburgh & Baltimore Coal Co. (C. C. A. 3), 218 Fed. 604, 605 12

St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 70 L. Ed. 979 ..... 10, 21
Sweeney v. Erving, 228 U. S. 233, 238, 57 L. Ed. 815, 818 35
Toledo, St. Louis & Western R. R. Co. v. Allen, 276 U. S. 165, 72 L. Ed. 513 10
Wagner v. St. Louis-San Francisco Ry. Co., 223 Mo. A. 864, 19 S. W. (2d) 518, 521 15
Western & A. R. R. v. Michael, 42 Ga. App. 603, 157 S. E. 226 14
Wheelock et al. v. Freiwald (C. C. A. 8), 66 Fed. (2d) 694, 697 11
Wilson v. Atlantic Coast Line R. Co., 134 S. C. 31, 131 S. E. 777 15
Wormell v. R. R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321 14

Statutes Cited.

Federal Employers' Liability Act, 45 U. S. C. A., Chap. 2, Sec. 51; Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65 ..... 2, 16, 29
Judicial Code, Sec. 240 (a), as amended by the Act of Feb. 13, 1925 [Sec. 347 (a), Title 28, U. S. Code] ... 18

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of the WABASH RAILWAY COMPANY, a Corporation,
Petitioners,

vs.

OLIVER S. PERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, respectfully show to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit for damages for injuries sustained by respondent when the side door of a freight car fell from its moorings and struck and injured respondent. Respondent was a car inspector employed by petitioners at their railroad yards in Moberly, Missouri. Both parties were engaged in interstate commerce at the time of the injury on July 12, 1939, and the suit was brought and tried under the Federal

Employers' Liability Act, 45 U. S. C. A., Title, "Liability for Injuries to Employees," Chapter 2, Section 51, page 92. Suit for $75,000.00 damages was filed in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

Trial of the case in said District Court resulted in judgment for respondent for $23,500 (R. p. 27). Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit, which court affirmed the judgment (R. p. 483). Petition for rehearing was denied (R. p. 499), and petitioners bring the case here by this petition for writ of certiorari.

THE FACTS.

Petitioners, as Receivers of the Wabash Railway Company, a corporation, were in possession of, and were managing and operating the Wabash Railway Company, and were in possession of its properties, including the railroad and railroad switch yards in Moberly, Missouri. Petitioners were operating the freight train and railroad switch yards in Moberly, Missouri, in interstate commerce, and respondent was, and for eighteen years had been, in their employ as a car inspector, both petitioners and respondent being engaged in handling and moving interstate commerce at the time of the occurrence complained of.

On July 12, 1939, about 10:35 o'clock p. m., respondent and three other employees of petitioners were attempting to close a side door on Wabash car No. 45034, a freight car, which door was suspended from a track at its top by means of two hangers which operated on rollers or wheels—one at either end of the door—and which were for the purpose of permitting the door to be opened and closed by sliding it back and forth. Respondent, after having first inspected the door and its appliances for the purpose

of determining whether there was any defect that would interfere with the closing of the door, was prying up under the center of it with a crowbar; one of the other employees was pulling on a handle at the front of the door, and the two others were pushing against it from the rear, when the door hangers came off the track at the top and the door fell, striking respondent and causing him to sustain a broken back and other injuries.

The case was tried on respondent's amended complaint (R. pp. 15-17), which alleged that "while he was so at work assisting in attempting to close this door, because and as a result of the negligence, carelessness and unlawful conduct of the defendants, this door was caused to, and did fall from the car" (R. p. 16), there being no other charge of negligence.

The case was submitted to the jury on the theory that the doctrine res ipsa loquitur applied. There was no evidence that the car door, the hangers or the track, or any of the appliances of the door were defective, and no proof that the door was caused to fall by reason of any defect. Neither was there any evidence that petitioners were negligent in any respect.

Petitioners introduced evidence that the door fell when respondent applied the crowbar under the center of it, and they contended that such action on the part of respondent caused the door to fall. Respondent admitted the fact but denied that his act caused the door to fall, and contended that it could not have been pried off the track if it had been in good condition.

The Court charged the jury that "the fact, if it be a fact, that the car door or its supporting appliances were defective caused the door to fall and that the means of knowing what kind of defect, if any, caused the door to fall was exclusively and entirely within the knowledge

and control of the defendant and was not known by plaintiff or readily determinable by plaintiff, then you are instructed that such facts, if you believe them to be true, are sufficient circumstantial evidence to permit a finding by you that the defendant was negligent" (R. pp. 450, 451).

The Court refused to charge the jury that if the plaintiff had control of the door at the time of the occurrence he could not recover, and refused to charge the jury to return a verdict for defendants unless they found that defendants had exclusive charge of the door (R. pp. 401, 402).

On March 14, 1941, the jury returned a verdict finding the issues in favor of respondent and assessing his damages at $23,500.00 (R. pp. 26-27), and on the same day judgment for $23,500 was entered on said verdict (R. p. 27).

Thereafter, and in due time, and on March 18, 1941, petitioners filed their motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial (R. pp. 463-466), which motion was by the Court overruled on April 7, 1941 (R. p. 466).

Petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit (notice of appeal filed April 12, 1941, R. p. 1; bond on appeal filed April 12, 1941, R. p. 2; designation of defendants of contents of transcript of record on appeal filed April 23, 1941, R. pp. 468-469; appellants' statement of points to be relied upon on appeal, R. pp. 2-4; designation of plaintiff of additional portions of record on appeal filed April 28, 1941, R. pp. 469-470; certificate of the clerk as to the correctness and completeness of the transcript of the record, testimony and proceedings filed May 21, 1941, R. pp. 470-471).

The case was briefed and submitted to the said Circuit

Court of Appeals, and was argued orally before said Court on September 11, 1941.

At the trial of the case in the District Court petitioners complained to said District Court, and in their briefs and oral arguments complained to said Circuit Court of Appeals that the trial court erred in submitting the case to the jury under the doctrine of res ipsa loquitur, and also erred in charging the jury that exclusive knowledge and control by the defendants "of the means of knowing what kind of defect, if any, caused the door to fall" afforded a sufficient basis for a finding that defendants were negligent, when there was no evidence of a defect and no evidence that defendants were negligent.

Petitioners also complained both to the said District Court and to said Circuit Court of Appeals in their briefs and at the oral arguments that there was no evidence in the case from which the jury could have found that defendants had knowledge of any defect in the door, or that they had "exclusive knowledge and control of the means of knowing what caused the door to fall," but that plaintiff had control of the door and its attachments and appliances at the time of the occurrence complained of; that defendants had no means of knowledge except through plaintiff, and that, therefore, the doctrine res ipsa loquitur did not apply.

Petitioners also complained to said District Court and to the said Circuit Court of Appeals, both in their briefs and at the oral arguments, that viewed in the light most favorable to respondent, and giving him the benefit of every inference and intendment that could reasonably be drawn from the evidence, the reason why the door fell was left entirely to speculation and conjecture and that under such circumstances it was error to submit the case to the jury.

Petitioners, in the original brief filed in the said Circuit

Court of Appeals, presented to said Circuit Court of Appeals for its determination the following propositions of law in the following language:

> "1. The Court erred in overruling defendants' motion for a directed verdict at the close of plaintiff's case and again at the close of the whole case.
>
> "(a) This case was pleaded, tried and submitted under the Federal Employers' Liability Act, and therefore the doctrine of res ipsa loquitur does not apply" (Appellants' Brief, p. 26).
>
> "(b) It was plaintiff's duty, as car inspector, to examine and inspect the open door on freight car No. 45034 in order to determine whether the door could be safely closed, and to close the door, or, if it could not be safely closed, order it sent to the repair track for repairs. At the time of the accident complained of, plaintiff was attempting to close the door which struck and injured him, and the door was in his control as car inspector, and not within the exclusive control of defendants. Therefore, the doctrine of res ipsa loquitur does not apply" (Appellants' Brief, pp. 26-27).
>
> "(c) Reliance upon the doctrine of res ipsa loquitur does not in any event relieve plaintiff of the burden of proving negligence on the part of defendants. The evidence fails to show that defendants were guilty of any actionable negligence. Therefore, the evidence was insufficient to justify submission of the case to the jury" (Appellants' Brief, p. 27).
>
> "(d) Viewed in the light most satisfactory to plaintiff, and giving plaintiff the benefit of every reasonable inference and intendment that can be drawn from the evidence, the reason why the door fell is left entirely to speculation and conjecture. Under such circumstances, it was error for the Court to submit the case to the jury" (Appellants' Brief, p. 27).

Petitioners herein, appellants in the Circuit Court of Appeals, cited cases and authorities for each of the above

propositions of law and argued said propositions and complained of them to said Circuit Court of Appeals.

On October 13, 1941, the said Circuit Court of Appeals filed its opinion (Rec. pp. 473-483), in which it held:

> "* * * the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" (R. p. 477).
>
> " 'That the accident was unusual, there can be no question, and we think it is **probable** that it was the result of negligence rather than pure accident. Under such circumstances the law creates an inference sufficient to carry the case to the jury' " (Rec. p. 479). (Emphasis ours.)

Petitioners argued both in the District Court and in the said Circuit Court of Appeals, and both in their briefs and at the oral arguments, that negligence of defendants could not be inferred from the mere fact that the injury occurred, but that to hold a master responsible under the Federal Employers' Liability Act a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto, and argued that in a case between an employer and employee under the Federal Employers' Liability Act the fact of accident carries with it no presumption of negligence on the part of the employer, but that it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence.

On October 24, 1941, petitioners filed a petition for a rehearing in said Circuit Court of Appeals, in which it again pointed out and complained that the opinion of said Circuit Court of Appeals was erroneous wherein it held that the "fact of injury itself is deemed to afford sufficient evidence to support recovery in the absence of explana-

tion by the defendant tending to show that the injury was not due to its want of care'' (Rec. p. 477).

In their said petition for a rehearing petitioners cited cases and decisions of the Supreme Court of the United States, and of several of the Circuit Courts of Appeals, all agreeing with petitioners' contention, and stating the law to be that negligence of defendant will not be inferred from the mere fact that the injury occurred, but that such negligence is an affirmative fact for the injured employee to establish by evidence.

The said petition for a rehearing was overruled by the said Circuit Court of Appeals on October 30, 1941 (Rec. p. 499).

Petitioners submit that with reference to the propositions of law here mentioned, to wit: As to whether negligence will be inferred in a case under the Federal Employers' Liability Act from the mere fact that the injury occurred, or as to whether the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation, the District Court committed reversible error, and the said Circuit Court of Appeals committed reversible error.

Wherefore, petitioners present to this Honorable Court the following questions:

QUESTIONS PRESENTED.

I.

In a suit arising under the Federal Employers' Liability Act, where the evidence fails to disclose any negligence of the employer, does the mere fact that the employee was injured while pursuing his duties afford sufficient evidence to support recovery in the absence of explanation by the

employer tending to show that the injury was not due to his want of care?

II.

In a suit arising under the Federal Employers' Liability Act, is it correct to submit to a jury the question of whether the "means of knowing" what defect, if any, caused a door to fall "was exclusively and entirely within the knowledge and control of the defendant and was not known by plaintiff or readily determinable by plaintiff," when the undisputed facts show that the plaintiff himself was in actual physical control of the door, and was admittedly employed for the purpose of, and charged with the duty of, inspecting the door to determine whether it could be safely closed?

III.

In a suit brought under the Federal Employers' Liability Act for damages for injuries sustained when the door of a freight car fell on an experienced employee while he was prying up under the center of such door with an iron crowbar as he and three other employees were attempting to close it, and where the injured employee was, and for eighteen years had been, charged with the duty of first inspecting the door, its hangers and attachments, and, second, with the duty of closing such door if, in his opinion, it could be safely closed, does the mere fact that the door fell on such employee and injured him while he was prying up with the crowbar amount to sufficient evidence to support recovery in the absence of explanation by the employer tending to show that the injury was not due to the employer's want of care?

REASONS FOR GRANTING THE WRIT.

I.

There was no evidence in the record from which the jury could reasonably find that the door fell because of any negligence of petitioners, or because of any defect. Under such circumstances the jury verdict was based on pure speculation and conjecture, and the decision of the Court of Appeals that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" is in direct conflict with the decisions of the Supreme Court in **Atchison, Topeka & Santa Fe Railway Co. v. Saxon**, 284 U. S. 458, 459, 76 L. Ed. 397, 398; **Looney v. Metropolitan R. R. Co. et al.**, 200 U. S. 480, 50 L. Ed. 564, 568; **Delaware, Lackawanna & Western R. Co. v. Koske**, 279 U. S. 7, 73 L. Ed. 578; **Patton v. Texas & Pacific Ry. Co.**, 179 U. S. 658, 45 L. Ed. 361; **Chicago, M. & St. P. R. Co. v. Coogan**, 271 U. S. 472, 70 L. Ed. 1041; **Pennsylvania R. Co. v. Chamberlain**, 288 U. S. 333, 77 L. Ed. 819; **Northwestern Pac. R. Co. v. Bobo**, 290 U. S. 499, 78 L. Ed. 462; **Toledo, St. Louis & Western R. R. Co. v. Allen**, 276 U. S. 165, 72 L. Ed. 513; **Atchison, Topeka & Santa Fe Ry. Co. v. Toops**, 281 U. S. 351, 74 L. Ed. 896; **N. Y. Central R. Co. v. Ambrose**, 280 U. S. 486, 74 L. Ed. 562, and **St. Louis-San Francisco R. Co. v. Mills**, 271 U. S. 344, 70 L. Ed. 979.

(a) Said decision of said Circuit Court of Appeals is in direct conflict with the following prior decisions of said Court:

F. W. Martin & Co. v. Cobb (C. C. A. 8), 110 Fed. (2d) 159, 163;

Southern Ry. Co. v. Stewart (C. C. A. 8), 115 Fed. (2d) 317, 322;

Southern Ry. Co. v. Stewart (C. C. A. 8), (on rehearing), 119 Fed. (2d) 85, 89;
Cryder v. Chicago, R. I. & P. Ry. Co. (C. C. A. 8), 152 Fed. 417, 419;
Kyner v. Portland Gold Mining Co. (C. C. A. 8), 184 Fed. 43, 47;
Midland Valley R. Co. v. Fulgham (C. C. A. 8), 181 Fed. 91, 95;
Missouri, K. & T. Ry. Co. v. Foreman et al. (C. C. A. 8), 174 Fed. 377, 381;
Wheelock et al. v. Freiwald (C. C. A. 8), 66 Fed. (2d) 694, 697;
Canadian Northern Ry. Co. v. Walker, 172 Fed. 346, 356;
Northern Pac. Ry. Co. v. Dixon (C. C. A. 8), 139 Fed. 737, 740;
Chicago & N. W. Ry. Co. v. O'Brien (C. C. A. 8), 132 Fed. 593, 596, 597, 598;
Nebraska Bridge Supply & Lumber Co. v. Jeffery (C. C. A. 8), 159 Fed. 609, 611;
Kaemmerling v. Athletic Mining & Smelting Co. (C. C. A. 8), 2 Fed. (2d) 574;
Phillips Petroleum Co. v. Manning (C. C. A. 8), 81 Fed. (2d) 849, 851, 852, 853;
Copeland v. Chicago, B. & Q. R. Co. (C. C. A. 8), 293 Fed. 12.

(b) Said decision of said Circuit Court of Appeals is in direct conflict with the following decisions of other Circuit Courts of Appeals:

(SECOND CIRCUIT)

New England Navigation Co. v. Luliano (C. C. A. 2), 192 Fed. 551, 554;
Schroble v. Lehigh Valley R. Co. (C. C. A. 2), 62 Fed. (2d) 993, 996;
McDonnell v. Oceanic Steam Navigation Co. (C. C. A. 2), 143 Fed. 480, 483.

(THIRD CIRCUIT)

Philadelphia & R. Ry. Co. v. Thirouin (C. C. A. 3), 9 Fed. (2d) 856, 858;
Pennsylvania R. Co. v. Knox (C. C. A. 3), 218 Fed. 748, 753;
Payne v. Buecher (C. C. A. 3), 270 Fed. 38, 40;
Philadelphia & R. Ry. Co. v. Cannon (C. C. A. 3), 296 Fed. 302, 304, 306;
Stepanovich v. Pittsburgh & Baltimore Coal Co. (C. C. A. 3), 218 Fed. 604, 605;
Sierocinski v. E. I. Du Pont deNemours & Co. (C. C. A. 3), 118 Fed. (2d) 531, 535.

(FOURTH CIRCUIT)

Leonard v. Miami Mining Co. (C. C. A. 4), 148 Fed. 827, 828;
James Stewart & Co. v. Newby (C. C. A. 4), 266 Fed. 287, 290;
Colonna v. Merchants & Miners Transportation Co. (C. C. A. 4), 112 Fed. (2d) 612, 615;
Hodges v. Kimball et al. (C. C. A. 4), 104 Fed. 745, 751;
Spain v. Powell et al. (C. C. A. 4), 90 Fed. (2d) 580, 581, 582, 583.

(FIFTH CIRCUIT)

Brown v. Goodyear Yellow Pine Co. (C. C. A. 5), 102 Fed. (2d) 726;
Aqua System, Inc., v. Kodakoski (C. C. A. 5), 88 Fed. (2d) 395, 398;
Bray v. Gulf Stevedoring Co. (C. C. A. 5), 18 Fed. (2d) 411, 412;
Roberts v. L. & N. R. Co., 111 Fed. (2d) 826, 827, 828.

(SIXTH CIRCUIT)

Carpenter v. Baltimore & Ohio R. Co. (C. C. A. 6), 109 Fed. (2d) 375, 378;
Moit v. Illinois Central R. Co. (C. C. A. 6), 153 Fed. 354, 356;

Detroit, G. H. & M. Ry. Co. et al. v. Maldonado (C. C. A. 6), 59 Fed. (2d) 911, 912;
Bush v. Cincinnati Traction Co. (C. C. A. 6), 192 Fed. 241, 244;
Southern Ry. Co. v. Derr (C. C. A. 6), 240 Fed. 73, 74, 76;
Carnegie Steel Co. v. Byers (C. C. A. 6), 149 Fed. 667, 669;
O'Mara v. Pennsylvania R. Co. (C. C. A. 6), 95 Fed. (2d) 762, 763.

(SEVENTH CIRCUIT)

Pierce v. Kile (C. C. A. 7), 80 Fed. 865, 867.

(EIGHTH CIRCUIT)

Cases from Eighth Circuit are cited under paragraph (a) of the first reason for granting the writ.

(NINTH CIRCUIT)

Chicago, M. St. P. & P. R. Co. v. Gilbert (C. C. A. 9), 87 Fed. (2d) 282, 286;
Erickson v. Pacific States Lumber Co. (C. C. A. 9), 18 Fed. (2d) 513, 514;
Lucid v. E. I. Du Pont deNemours Co. (C. C. A. 9), 199 Fed. 377, 378, 379.

(c) Said decision of the Circuit Court of Appeals is in direct conflict with the general law of the states as declared in the following cases:

Seaboard Air Line Ry. Co. v. Hackney, 217 Ala. 382, 115 So. 869;
Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 Pac. 719;
Missouri Pacific Co. v. Remel, 185 Ark. 598, 48 S. W. (2d) 548 (c. d. 287 U. S. 634, 77 L. Ed. 550);
Missouri Pacific R. Co. v. Montgomery, 186 Ark. 537, 55 S. W. (2d) 68 (c. d. 289 U. S. 747, 77 L. Ed. 1493);
Mosley v. Raines, 183 Ark. 569, 37 S. W. (2d) 78, 80;

Prichard v. Southern Pac. Co. et al., 9 Cal. App. (2d) 701, 51 Pac. (2d) 426, 427;
Dryden v. Western Pac. R. Co., 1 Calif. App. (2d) 49, 36 Pac. (2d) 394;
Denver & S. L. Ry. Co. v. Mullen, 86 Colo. 159, 279 Pac. 49, 50, 51;
Western & A. R. R. v. Michael, 42 Ga. App. 603, 157 S. E. 226;
Hamilton v. Chicago, B. & Q. R. Co., 211 Iowa 924, 234 N. W. 810, 812, 813;
Brownfield Ry. Co. v. Chic., R. I. & P. Ry., 107 Iowa 254, 77 N. W. 1038;
Degner v. Anderson, 213 Iowa 588, 239 S. W. 790, 791;
Brooks v. Louisville & N. R. Co., 233 Ky. 656, 26 S. W. (2d) 523, 524, 525;
Gibralter Coal Mining Co. v. Collins, 237 Ky. 765, 36 S. W. (2d) 372, 373;
Brooks v. Arnett, 253 Ky. 491, 69 S. W. (2d) 1029, 1030;
Burmaster v. Tex. & P. M. P. Terminal R. of New Orleans, 6 La. App. 778;
Wormell v. R. R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321;
Loring v. Maine Cent. R. Co., 129 Me. 369, 152 Atl. 527;
Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338;
Slamin v. New York, N. H. & H. R. Co., 282 Mass. 590, 185 N. E. 353, 354;
Shipp v. Boston & M. R. R. Co., 283 Mass. 266, 186 N. E. 653;
Koetsier v. Cargill Co., 241 Mich. 370, 217 N. W. 51, 52, 53;
Mining Co. v. Kitts, 42 Mich. 41, 3 N. W. 240;
James v. Yazoo & M. V. R. Co., 153 Miss. 776, 121 So. 819;
Brown v. Coley, 168 Miss. 778, 152 So. 61;
Goodyear Yellow Pine Co. v. Clark, 163 Miss. 661, 142 So. 443;

Illinois Central R. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138;
New Orleans Great Northern R. Co. v. Branton, 167 Miss. 52, 146 So. 870 (c. d. 290 U. S. 667, 78 L. Ed. 577);
Sabol v. St. Louis Cooperage Co., 313 Mo. 527, 282 S. W. 425, 428, 429;
Wagner v. St. Louis-San Francisco Ry. Co., 223 Mo. A. 864, 19 S. W. (2d) 518, 521;
Healy v. Erie R. Co., 259 N. Y. 40, 180 N. E. 888, 890;
Grant v. R. R. Co., 133 N. Y. 659, 31 N. E. 220;
Austin v. So. Ry. Co., 197 N. C. 319, 148 S. E. 446;
Potter v. Atl. Coast Line R. Co., 197 N. C. 17, 147 S. E. 698;
Clinard v. Clinard Electric Co., 192 N. C. 736, 136 S. E. 1;
Cole v. Seaboard Air Line Ry. Co., 199 N. C. 389, 154 S. E. 682 (c. d. 282 U. S. 898, 75 L. Ed. 791);
McGraw v. Southern Ry. Co., 206 N. C. 873, 175 S. E. 286;
Bakkin v. State, 60 N. D. 344, 234 N. W. 513;
Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Stat. Rep. 613;
Fisher v. Kansas City, M. & O. Ry. Co., 169 Okla. 282, 36 Pac. (2d) 744;
Bell et al. v. McDonnell, 156 Okla. 68, 9 P. (2d) 735, 736;
Fitzgerald v. Oregon-Washington R. & Nav. Co., 141 Oregon 1, 16 Pac. (2d) 27, 30, 31;
Raftery v. Pittsburgh & W. V. Ry. Co., 284 Pa. 555, 131 Atl. 470;
Dawson v. Reading Co., 283 Pa. 301, 142 Atl. 295 (c. d. 278 U. S. 628, 73 L. Ed. 547);
Wilson v. Atlantic Coast Line R. Co., 134 S. C. 31, 131 S. E. 777;
Louisville & N. R. Co. v. Jackson, 3 Tenn. A. 463;
Hunt v. Robinson, ... Tex. Civ. App. ..., 55 S. W. (2d) 166, 167;

Seaboard Air Line Ry. Co. v. DeLoatch, 149 Va. 338, 141 S. E. 121;
Chesapeake & O. Ry. Co. v. Butler, 163 Va. 626, 177 S. E. 195;
Sowers v. Virginian Ry. Co., 101 W. Va. 582, 133 S. E. 325;
Rupert v. Chicago, M. St. P. & P. R. Co., 202 Wis. 563, 232 N. W. 550 (c. d. 283 U. S. 840, 75 L. Ed. 1451).

(d) Said decision of the said Court of Appeals is violative of the Federal Employers' Liability Act, which is as follows:

> "Section 51. **Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence.** Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)"

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued by this Honorable Court and that

the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
St. Louis, Mo.,
Solicitor for Petitioners.

N. S. BROWN,
J. H. MILLER,
R. B. ELSTER,
St. Louis, Mo.,
Of Counsel.